IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-996

LOUIS J. POMPONIO, JR.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR RECONSIDERATION

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April 1977

LEX PRINTING CO., INC., 451 GREENWICH ST., N.Y. 10013—966-4300

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Petitioner moves the Court for an order (1) vacating the denial of the petition for writ of certiorari entered on April 18, 1977 and (2) granting the petition. As grounds for this motion, petitioner states the following:

Petitioner was convicted of one count of conspiracy and two substantive counts of violating the Travel Act, 18 U.S.C. § 1952.[1] The indictment charged that petitioner

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[1] The Travel Act provides, in relevant part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to . . .
>
> (3) promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be

traveled from Virginia to New York with the intent to carry on the "unlawful activity" of offering money to an officer of a federally-insured bank in New York, in violation of both New York Penal Law § 180.00 (McKinney 1975) and 18 U.S.C. § 215. The jury was charged that it should convict petitioner if it found that he violated either the New York statute or section 215.

The question raised by the present petition is whether violation of either New York Penal Law § 180.00 or 18 U.S.C. § 215 was properly charged as an unlawful activity within the meaning of the Travel Act. That there is a direct and unambiguous conflict between the Fourth Circuit (in the instant case) and the Second Circuit (in *United States* v. *Brecht,* 540 F.2d 45) on the question of whether acts of commercial bribery, as defined by the New York statute, are an unlawful activity under the Travel Act is clear, and is conceded by the Solicitor General. We shall not belabor that point. It would seem, therefore, that in denying the petition herein the Court was persuaded by the government's argument that there was an alternative ground upon which the conviction could be sustained, *i.e.,* that section 215 was properly charged as a predicate crime to the Travel Act even if the New York statute was improperly charged. In reviewing the papers we have filed with the Court we concluded that the reasons why section 215 cannot serve as a predicate "unlawful activity" were not fully presented.[2]

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fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means . . .

(2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

[2] In doing so, we do not repeat our argument that, under *Yates* v. *United States,* 354 U.S. 298, the verdict in the instant case must be set aside if *either* the New York Penal Law *or* section 215 were improperly charged as a predicate crime. See Petition at 12; Petitioner's Reply at 2.

1. There is a conflict between the Second and Fourth Circuits not only as to New York Penal Law § 180.00, but also as to 18 U.S.C. § 215.

The government, agreeing that there is a conflict of circuits on the question of whether violation of New York Penal Law § 180.00 is an "unlawful activity" under the Travel Act, argues that no such conflict exists on the question of whether violation of the federal statute, 18 U.S.C. § 215, can be such an "unlawful activity". The government is mistaken. Section 215 is no less a commercial bribery statute than the New York commercial bribing statute involved in the *Brecht* case.

18 U.S.C. § 215 reads as follows:

> Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both.

By its terms, it prohibits a bank officer from accepting payments to influence his conduct with respect to a bank loan or similar transaction. A bank officer is not a public official, and his acts are not those of a public official. Section 215 encompasses purely commercial acts—acts which would be a violation, as the government acknowledges, of the New York commercial bribery statute, but which would not be a violation of the traditional bribery statutes of New York or any other state, *i.e.*, bribery of a public official.

The rationale of the *Brecht* decision was that the "unlawful activity" of "bribery", as defined in the Travel Act, encompasses only acts of bribery by or of a public official, and not commercial bribery. The Second Circuit's holding, therefore, would bar a Travel Act prosecution predicated on section 215 for the same reason that it would bar such a prosecution predicated on New York Penal Law § 180.00. In short, the clear conflict between the Fourth and Second Circuits on the scope and definition of the Travel Act exists whether the unlawful activity charged be a violation of 18 U.S.C. § 215 or New York Penal Law § 180.00, and there is no alterative ground upon which petitioner's conviction may be sustained.

2. The Second Circuit's construction of the Travel Act as not encompassing acts of commercial bribery is the only logical way of analyzing the overall congressional scheme.

18 U.S.C. § 215 was adopted in 1948 and is derived from statutes dating several decades prior to that. It provides that a federal bank employee who *accepts* a bribe is guilty of a misdemeanor. It provides no penalty at all for the person who gives the bribe; neither does any other federal statute.

The Travel Act, enacted in 1961, created a major felony for interstate travel to commit bribery. If bribery, within

the meaning of the Travel Act, is construed as limited to bribery of public officials, then Congress would have acted consistently in making Travel Act violations felonies. This is so because all prior and subsequent federal statutes criminalizing bribery of public officials established felony penalties (*e.g.*, 18 U.S.C. §§ 201, 203); imposing Travel Act liability upon such acts would not create inconsistent and disproportionate sanctions.

On the other hand, construction of the Travel Act to include acts of commercial bribery as predicate unlawful activities leads to absurd and illogical results. It requires a finding that Congress intended:

(a) to continue to impose only misdemeanor penalties, pursuant to section 215, upon a bank employee who sits in New York and receives a commercial bribe, and to impose no penalties at all on the bribe-giver; while at the same time

(b) to impose major felony penalties, pursuant to the Travel Act, upon the same bank employee *or* bribe-giver for the identical acts if either traveled from Virginia.[3]

It is logical to assume that if Congress wished to make criminal petitioner's alleged acts pursuant to section 215, it would have done so. Similarly, if Congress wished to elevate section 215 to a felony, it would have done so. It is illogical to assume that Congress intended the wholly fortuitous and jurisdictionally unnecessary element of in-

[3] Actually the denial of certiorari in this case would lead to even more anomalous results. If petitioner had given the bribe in question in Virginia, there would have been no criminal penalty; if he had traveled from Connecticut or Vermont to New York to give the bribe, there still would have been no penalty, under the *Brecht* decision. Because he traveled from Virginia to New York and because he was indicted in Virginia instead of New York, there is a penalty. We do not venture a prediction as to how the courts will hold in other hypothetical cases.

terstate travel to determine whether major or minor federal criminal penalties should apply, or even whether or not federal criminal sanctions should apply at all.

The only logical conclusion is that Congress intended to reach in the Travel Act only traditional acts of bribery of or by public officials, acts which Congress itself defined in previously existing federal statutes as felonies.

Conclusion

Section 215, no less than the New York Penal Law § 180.00, is a commercial bribery statute. Accordingly, there is no way in which petitioner's conviction may be upheld without creating a clear conflict with the holding of the Second Circuit in the *Brecht* case. The Court should grant certiorari to resolve that conflict in an important area of the construction and application of the federal criminal laws.

Respectfully submitted,

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April, 1977

Certificate of Counsel

As counsel for the petitioner, I hereby certify that this petition for reconsideration is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2).

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VICTOR RABINOWITZ

April 27, 1977